LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
MAR 13 1961
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No. 51

UNITED GAS PIPE LINE COMPANY,
Petitioner,

vs.

IDEAL CEMENT COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF OF RESPONDENT IN OPPOSITION.

MARION R. VICKERS,
P. O. Box 990,
Mobile, Alabama,
EDWIN J. CURRAN, JR.,
P. O. Box 990,
Mobile, Alabama,
Counsel for Respondent.

VICKERS, RIIS, MURRAY and CURRAN,
P. O. Box 990,
Mobile, Alabama,
Of Counsel.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

INDEX

Page

Summary Statement of Reason for Denial of the Writ 1

Petitioner's Statement of the Case Is Not Entirely Accurate 2

Petitioner's Statements As to the Reasons for Granting the Writs Are Not Accurate 5

Argument 6

Conclusion 17

Cases Cited.

East Ohio Gas Company v. Tax Commission of Ohio, 75 L. Ed. 1171, 283 U. S. 465 (1931) 11

Freeman v. Hewitt, 91 L. Ed. 265, 329 U. S. 249 (1946) 8

Gay v. United Gas Pipe Line Co., 32 S. 2d 690 (1947) 16

Illinois Natural Gas Company v. Central Illinois Public Service Commission, 86 L. Ed. 371, 314 U. S. 498 (1942) 11

International Harvester Co. v. Department of Treasury, 322 U. S. 340, 88 L. Ed. 1313 (1944) 13, 14

McGoldrick v. Berwind-White Co., 309 U. S. 33, 84 L. Ed. 565 (1940) 13

Memphis Gas Company v. Beeler, 315 U. S. 649, 86 L. Ed. 1090 (1942) 6, 7

Mississippi River Fuel Corporation v. Hoffman, 123 N. E. 2d 503 (1955), cert. den. 349 U. S. 935, 99 L. Ed. 1264 (1955) 11, 16

Northwestern States Portland Cement Company v. Minnesota, 3 L. Ed. 2d 421, 358 U. S. 450 (1958) ... 5

Ozark Pipe Line Corporation v. Monier, 69 L. Ed. 439, 266 U. S. 555 (1925) 16

Panhandle Eastern Pipe Line Company v. Michigan Public Service Commission, 95 L. Ed. 993, 341 U. S. 329 (1950) 10, 11
Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana, 92 L. Ed. 136, 332 U. S. 507 (1947) 3, 10, 16
Pennsylvania Gas Co. v. Public Service Commission, 64 L. Ed. 434, 252 U. S. 23 ..... 8, 16
Puget Sound Stevedoring Company v. State Tax Commission, 82 L. Ed. 68, 302 U. S. 90 16
Railway Express Agency, Inc. v. Commonwealth of Virginia, 98 L. Ed. 757, 347 U. S. 359 (1954) 16
Spector Motor Service, Inc. v. O'Connor, 95 L. Ed. 573, 34 U. S. 602 (1951) 7, 16
State Tax Commission of Mississippi v. Interstate Natural Gas Company, 76 L. Ed. 136, 284 U. S. 41 (1931) 3, 16
Texas Gas Transmission Corp. v. Atkins, 197 Tenn. 123, 270 S. W. 2d 384; certiorari denied, 348 U. S. 883, 99 L. Ed. 694 16
United Gas Pipe Line Co. v. Lee, 17 S. 2d 553, 154 Ala. 617 (1944) 16
United States v. Erie R. R. Co., 74 L. Ed. 187, 280 U. S. 98 (1929) 4
United States v. Public Utilities Commission, 345 U. S. 295, 97 L. Ed. 1020 (1953) 10

Textbooks and Annotations Cited.

11 Am. Jur. 61, Commerce, Sec. 65 4
51 Am. Jur. 96, Taxation, Sec. 68 9
74 L. Ed. 190—Subject: Local Transportation of goods as part of interstate or foreign commerce 4

Statutes Cited.

Title 15, U. S. C. A., Sec. 717 et seq. 10

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No. .....

UNITED GAS PIPE LINE COMPANY,
Petitioner,

vs.

IDEAL CEMENT COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit.

BRIEF OF RESPONDENT IN OPPOSITION.

Respondent, Ideal Cement Company, respectfully says that the petition for writ of certiorari should be denied.

SUMMARY STATEMENT OF REASON FOR DENIAL OF THE WRIT.

The Court of Appeals for the Fifth Circuit has held that the ordinance of the City of Mobile, Alabama under consideration imposes a tax on the privilege of engaging in business, that Petitioner is engaged solely in interstate

commerce in Mobile, Alabama and that the tax as it applies to Petitioner is inapplicable because it would be a tax on the act or privilege of engaging in interstate commerce. It is admitted by Petitioner that the transaction between Petitioner and Respondent is one in interstate commerce, and this being true, the case falls clearly under the many decisions of this Court, that a State or municipality cannot lay a tax on the act or privilege of engaging in interstate commerce.

PETITIONER'S STATEMENT OF THE CASE IS NOT ENTIRELY ACCURATE.

There are certain inaccuracies in Petitioner's "Statement of the Case", which Respondent wishes to point out.

The basic question presented, as stated by Petitioner, is correct but should be more simply paraphrased as follows: Can a state or municipal government levy a direct tax on the act or privilege of engaging in interstate commerce without violating the Commerce Clause of the United States Constitution?

Petitioner wrongfully states that as a result of Respondent's defense of the suit by Petitioner on the ground that the reimbursement obligation of Respondent is limited to taxes validly imposed, "Petitioner was forced into the unique position of contending for, instead of against, the validity of a heavy tax levied upon it". Petitioner was notified prior to its payment of the tax to the City of Mobile that Respondent considered the tax unconstitutional and denied any liability for same. United could have taken the same position as Respondent and contended against the tax when imposed by the City of Mobile, but it elected to voluntarily pay the tax as if valid and sue Ideal for reimbursement. It is interesting to note that Petitioner has recently filed suit in the United States District Court for the Southern District of Ala-

bama against the City of Mobile for $185,785.04 to recover license taxes paid by it over the past 5 years under the ordinance of the City of Mobile in question in the instant case. It is suggested that Petitioner will not advocate that it's position in the District Court case is unique.

Petitioner states that "there is no claim (by Ideal) that the tax is discriminatory against interstate commerce . . . ." While it is not exactly clear what Petitioner means by this statement, Respondent's main contention in the case is, and has been since the start, that the tax in question is invalid in its attempted application to Respondent as violating the commerce clause of the U. S. Constitution.

Respondent disagrees with the unsupported statement of fact by Petitioner that, "Had the gas reached any of these other customers (industrial, commercial and domestic) the license tax would have applied to the sale . . . ." Petitioner is attempting here to place direct sales by an interstate pipeline company in the same category as sales by a local distributor to its customers of gas it has purchased from an interstate pipeline company, and this Petitioner is incorrect in doing.

Petitioner would make much ado over the fact that it employs a local gas company, Mobile Gas Service Corporation, to complete its delivery to Respondent. In other words, United subcontracts, so to speak, certain of the obligations which it has assumed in its contract to sell direct to Respondent, but this has no bearing on the instant case. This is especially so as Respondent is not a part of, nor does it have any interest in, said contract.

The activities carried on in the State of Alabama and the City of Mobile with respect to the sale and delivery of the natural gas to Respondent are, as numerous cases point out (to name a few, **Panhandle Eastern Pipe Line Co. v. Public Service Commission**, 92 L. Ed. 136, 322 U. S. 507; **State Tax Commission of Mississippi v. Interstate**

Natural Gas Co., Inc., 76 L. Ed. 156, 284 U. S. 414, plainly incident to the interstate commerce, and, if this be true, it is then immaterial whether Petitioner performs these incidental activities which a sale and delivery of gas to Respondent or any other party would always necessitate or whether it contracts these incidental activities to Mobile Gas Service Corporation.

The case is clearly analogous to one of interstate rail or motor transportation where local transportation (i. e., shipment from one point to another in a state by an agency operating entirely within the limits of a state) is still considered as interstate commerce. In order for such local transportation of goods to constitute interstate or foreign commerce, there must be such continuity of movement as to show that shipment to the ultimate destination was within the original contemplation of the shipper and that stoppage or change of carriers is merely incidental to the shipment. **United States v. Erie R. R. Co.**, 280 U. S. 98, 74 L. Ed. 190; See annotation 74 L. Ed. 190; 11 Am. Jur. 61, Commerce, Sec. 65.

Certainly there is no question in our case but that Petitioner contemplated that the destination of the gas was at the plant site of Respondent (the contract itself is conclusive evidence of this) and that the employment of Mobile Gas Service Corporation to deliver this gas in the City of Mobile to Respondent through its pipes, i. e., the change of carriers, is merely incidental to the shipment. Mobile Gas Service Corporation does absolutely nothing but that which Petitioner would itself have to do in the direct sale by it to Respondent if it did not have its arrangement with Mobile Gas Service Corporation.

The conclusion reached by the Court of Appeals in its per curiam opinion after Petitioner's second petition for rehearing that the City of Mobile tax is valid as to the 2c per Mcf. of United's sales price retained as compensation

by its agent, Mobile Gas Service Corporation, but not so as to the remaining gas received by Petitioner, is not unsupportable as suggested by Petitioner. Mobile Gas Service Corporation is a local corporation engaged exclusively, as far as its own business is concerned, in intrastate commerce. Its gross receipts from the sale or distribution of natural gas are subject to tax.

PETITIONER'S STATEMENTS AS TO THE REASONS FOR GRANTING THE WRITS ARE NOT ACCURATE

The question of federal law here involved has without question been settled by this Court. It is now well recognized that a tax on the act or privilege of engaging in exclusive interstate commerce is unconstitutional as placing an undue burden on such interstate commerce, i. e., it violates the commerce clause of the United States Constitution, and the Court of Appeals decision is in line with these recognized authorities.

Petitioner, in saying that the question of federal law involved has not been decided as to the natural gas industry, would apparently have this Court make a separate determination for every known business, which of course, would be a waste of this Court's time and energies. The language of this Court expressed on many occasions, as for example in the case of **Northwestern States Portland Cement Company v. Minnesota**, 3 L. Ed. 421, 358 U. S. 450 (1958) when Justice Clark wrote: "Moreover, it is beyond dispute that a State may not lay a tax on the 'privilege' of engaging in interstate commerce", clearly applies to the natural gas industry as well as any other.

ARGUMENT

Petitioner, in its petition, has quoted from or discussed eight cases and the Natural Gas Act which it contends support its position and Respondent, at the outset, and before affirmatively supporting the correctness of the Court of Appeals decision, will discuss and distinguish each of these authorities on which Petitioner relies.

On page 9 of its brief, Petitioner says that the Court of Appeals has ignored without any explanation or distinction, applicable decisions of the United States Supreme Court upholding state taxation and regulation of direct sales by interstate pipe line companies, and it concludes, on the basis of this erroneous statement, that if sales of natural gas may be taxed by the states without infringement of the commerce clause, such sales should also be taxable by municipalities. If sales such as are involved in our case were subject to taxation by the States, we would readily agree with Petitioner's conclusion that they would also be taxable by municipalities. The truth is, however, that such sales are not taxable even by a state and his quote from the case of **Memphis Gas Company v. Beeler**, 315 U. S. 649, 86 L. Ed. 1090, is clearly not applicable in our case when the full report of the Beeler case is read. The following facts were present in the Beeler case but are not present in the instant case:

1. Taxpayer managed its entire business in Memphis, Tenn., where it kept its accounts, provided for the payroll of employees on its line in other states as well as Tennessee and sent out bills for gas delivered in other states as well as Tennessee. As stated by Mr. Chief Justice Stone, "It has thus established a commercial domicile in Tennessee by virtue of which it is subject to taxation . . ."

2. The Tennessee tax in question is apparently an income tax on profits as opposed to a tax on the privilege of engaging in business.

3. Taxpayer delivered more than 80% of its gas to a local distributing company which sold the gas to local consumers under a contract with taxpayer which the Supreme Court of Tennessee found to be a joint adventure between the taxpayer and distributing company. The Supreme Court of Tennessee further held that the sales made by these partners or joint enterprisers was not interstate commerce. It is interesting to note that the taxpayer asked for a modification of the Supreme Court of Tennessee decree on the ground that some of taxpayer's income subject to tax was derived from certain sales to the distributing company not under the joint adventure agreement and to other companies, which it insisted were concededly sales interstate commerce. The Court rejected the contention upon the ground that taxpayer had failed to show what portion, if any, of the taxed profits were derived from such sales and therefore taxpayer had laid no basis for an injunction restraining collection of that part of the tax. The inference is clear that the interstate sales, as opposed to those in concert with the local distributor under a joint adventure, would have been immune from taxation.

This Court, in a footnote to Mr. Justice Burton's opinion in **Spector Motor Service v. O'Connor**, 95 L. Ed. 573, 340 U. S. 602, said as follows concerning the effect of the decision in the **Memphis Natural Gas Company v. Beeler** case, supra, on the situation in the **Spector** case (which, by the way, is one of the principal cases on which Respondent Ideal relies), viz.:

"The decision in **Memphis Natural Gas Co. v. Beeler**, 315 U. S. 649, 86 L. Ed. 1090, 62 S. Ct. 857, upheld a Tennessee tax on earnings of the taxpayer within that State where the earnings were derived from the interstate dis-

tribution of gas by the taxpayer in a joint enterprise with the Memphis Power & Light Company. Any suggestion in that opinion as to the possible validity of such a tax if applied to earnings derived wholly from interstate commerce is not essential to the decision in the case."

As for the case of **Pennsylvania Gas Co. v. Public Service Commission**, 64 L. Ed. 434, 252 U. S. 23, Respondent readily admits that there is a line of cases, of which **Pennsylvania Gas** is one, which hold, and rightly so, that the interstate sale of natural gas to industrial consumers is subject to local **regulation** imposed under the authority of the police power of the local governing body, state or municipal. These regulation cases employ such terms as "local characteristic", "essentially local", and the like in describing the sale or delivery of gas to local consumers and it is obvious that Petitioner seeks to confuse the Court by citing regulation cases and employing the language and reasoning of these regulation cases to a tax case as here involved.

There is a definite distinction between the power to regulate and the power to tax which this Court recognized, however, and it can be said with certainty, that the power to regulate does not necessarily carry with it the power to tax. The distinction is discussed in the case of **Freeman v. Hewitt**, 329 U. S. 249, 91 L. Ed. 265, when this Court said:

> ". . . but, in the necessary accomodation between local needs and the overriding requirement of freedom for the national commerce, the incidence of a particular type of State action may throw the balance in support of the local need because interference with the national interest is remote or unsubstantial. A police regulation of local aspects of interstate commerce is a power often essential to a State in safeguarding vital local interests. At least until Congress choses to enact a nation-wide rule, the power will not be denied to the State. **Minnesota Rate Cases**

(Simpson v. Shepard), 230 U. S. 352, 402 et seq., 57 L. Ed. 1511, 1542, 33 S. Ct. 729, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A 18; **South Carolina State Highway Dept. v. Barnwell Bros.**, 303 U. S. 177, 82 L. Ed. 734, 58 S. Ct. 510; **Union Brokerage Co. v. Jensen**, 322 U. S. 202, 209 212, 88 L. Ed. 1227, 1232 1234, 64 S. Ct. 967, 152 A. L. R. 1072. State taxation falling on interstate commerce, on the other hand, can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys. But revenue serves as well no matter what its source. To deny to a State a particular source of income because it taxes the very process of interstate commerce does not impose a crippling limitation on a State's ability to carry on its local function. Moreover, the burden on interstate commerce involved in a direct tax upon it is inherently greater, certainly less uncertain in its consequences, than results from the usual police regulations. The power to tax is a dominant power over commerce. Because the greater or more threatening burden of a direct tax on commerce is coupled with the lesser need to a state of a particular source of revenue, attempts at such taxation have always been more carefully scrutinized and more consistently resisted than police power regulations of aspects of such commerce. . . ."

The distinction between the two is also recognized in 51 Am. Jur., Taxation, Section 68, as follows:

"They are both distinct, coexistent powers in the State. Broadly speaking, the distinction is that the taxing power is exercised for the purpose of raising revenue and is subject to certain designated constitutional limitations, while the police power is exercised for the promotion of the public welfare by means of the regulation of dangerous or potentially dangerous

businesses, occupations or activities and is not subject to the constitutional restrictions applicable to the taxing power."

Thus a state or municipality may within its police power, have the authority to regulate (i. e., to establish rates, impose safety regulations and the like) the sale of natural gas from without the state to an industrial consumer within the state when in the local interest and not otherwise specifically regulated by Congress itself even though this regulation may indirectly affect interstate commerce. As pointed out above, however, there is a difference between regulation and taxation and regardless of the right to regulate, there can be no state or local tax on the act or privilege of engaging in interstate commerce as such, as the authorities hereinafter cited will clearly point out. Respondent submits, therefore, that the **Pennsylvania Gas Co.** case, supra, relied upon by Petitioner deals with regulation instead of taxation and hence is inapplicable to this case.

The cases of **Panhandle Eastern Pipe Line Co. v. Public Service Commission**, 332 U. S. 507, 92 L. Ed. 136; **Panhandle Pipe Line Co. v. Michigan**, 341 U. S. 329, 95 L. Ed. 993 and **United States v. Public Utilities Commission**, 345 U. S. 295, 97 L. Ed. 1020, also quoted from by Petitioner, are likewise regulation cases and subject to the same distinguishment as the **Pennsylvania Gas Co.**, case, supra. A reading of these cases; if not the quotations in Petitioner's brief themselves, clearly shows this to be true. Therefore, in citing the **Panhandle Eastern** case, supra, on page 12 of its brief as authority for the statement that, "It is now well established that such sales, although a part of interstate commerce, are nevertheless sufficiently local in aspect to support state regulation and taxation". Petitioner is in deliberate error as far as taxation is concerned.

We should mention briefly the Natural Gas Act (15 U. S. C. A., Sec. 717) of June 21, 1938, as reference to

same appears in a number of the regulation cases cited by Petitioner and as Petitioner makes reference to this act in its brief. By this act, Congress gave the Federal Power Commission power to **regulate** rates and all other aspects of sale of gas in interstate commerce to purchasers for resale to ultimate public consumers, whether they be domestic, commercial, industrial or otherwise, the purchasers being in general local public utility companies. Thus, now a state cannot regulate any feature of these sales because they are taken over by a Federal authority.

The Natural Gas Act, however, did not attempt to **regulate** direct sales for consumptive use (such as sales from Petitioner to Respondent) and such sales were expressly excluded from the application of the Act. The cases therefore hold, and again rightly so, that this field of regulation, i. e., regulating direct sales for consumptive use, has been left to the States, provided of course the state regulation does not unduly discriminate against interstate commerce.

Illinois Natural Gas Co. v. Central Illinois Public Service Commission, 314 U. S. 498, 86 L. Ed. 371; **Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission**, 95 L. Ed. 995, 341 U. S. 329.

It is important to note, however, that in none of the cases interpreting the Natural Gas Act is it ever stated that the States have a power to tax the interstate commerce (as opposed to regulate—the difference being more fully discussed above). See **Mississippi River Fuel Corporation v. Hoffman**, 123 N. E. 2d 503, certiorari denied, 349 U. S. 935.

It is clear from a reading of the case of **East Ohio Gas Co. v. Tax Commission**, 283 U. S. 465, 75 L. Ed. 1171, relied on by Petitioner, that the issue involved was not whether a particular tax placed an undue burden on interstate commerce but whether the taxpayer was engaged in

interstate or intrastate commerce. It was held by this Court, after a consideration of the fact situation involved (which, by the way, has no similarity to the instant case), that taxpayer was engaged in intrastate commerce and hence the tax, which was based on the privilege of engaging in intrastate commerce, was valid.

The Court, in its opinion, however, did state the well recognized law that a state cannot levy a tax on the act of engaging in interstate commerce.

It should be noted that in the instant case, Petitioner admits that the sale of gas from it to Respondent is one in interstate commerce. It is obvious that in order for the Court of Appeals to rule as it did, Respondent had the burden of proving two things, viz.: not only that the tax in its application to Respondent is one on the act or privilege of engaging in interstate commerce and hence void, but also, and first of all, that the transaction between Petitioner and Respondent was one in interstate commerce.

As for the question of whether this is interstate commerce, the Court of Appeals found—and the Petitioner has admitted—that it is. In summing up its findings on this point, the Court of Appeals, speaking through Chief Judge Reyes, said:

> "'We find, however, that the reductions in gas pressure prior to delivery to Scott and Ideal are not sufficiently 'realistic' changes to separate the gas from the flow of interstate commerce as it crosses into the jurisdiction of the City of Mobile.
>
> "In the course of its argument Appellee (Petitioner here) (parenthesis supplied) concedes that sales of gas to industrial consumers in the circumstances of this case are interstate commerce . . ."

This concession by Petitioner is further readily evident from a reading of its petition for writ of certiorari presently before this Court.

The **McGoldrick v. Berwind-White Co.** case, 309 U. S. 33, 84 L. Ed. 565, is not controlling in any way on the instant case because it involved a sales tax instead of a license or privilege tax as is imposed by the City of Mobile and the **McGoldrick** case tax was levied on the purchaser for consumption instead of on the seller. As the Court pointed out, "Only in event that the seller fails to pay over to the city the tax collected or to charge and collect it as the statute requires, is the burden cast on him".

The last of the cases cited by Petitioner in support of its petition for writ of certiorari is that of **International Harvester Co. v Department of Treasury**, 322 U. S. 340; 88 L. Ed. 1313, and it involved the constitutionality, which was upheld by this Court, of the Indiana Gross Income Tax Act of 1933. Petitioner in attempting to rely on this case, would mislead this court on page 16 of its brief, when it says:

> "Likewise, the interstate transportation was reflected in the gross receipts from the sale of goods brought into Indiana in **International Harvester Co. v. Department of Treasury**, 322 U. S. 340 (1944). This Court upheld 'a privilege tax upon the receipt of gross income' on direct sales completed in the state in the following language:".

(after which Petitioner quotes a paragraph from the case). This Court did not characterize the tax in the **International Harvester** case as a "privilege tax upon the receipt of gross income" as Petitioner suggests. On the contrary, this quote appeared only once in the **International Harvester** case, and in the following context:

> "The gross income tax collected on those transactions (i. e., those transactions under consideration in the **International Harvester** case) (parenthesis supplied) is the same one which was before this Court in **Department of Treasury v. Wood Preserving Corp.**, 313 U. S. 62, 85 L. Ed. 1188, 61 S. Ct. 885, and **J. D.**

Adams Mfg. Co. v. Storen, 304 U. S. 307, 82 L. Ed. 1365, 58 S. Ct. 913, 117 A. L. R. 429. The tax was described in the **Storen** case as **'a privilege tax upon the receipt of gross income,'** 304 U. S., p. 311. In that case an Indiana corporation which manufactured products and maintained its home office, principal place of business and factory in Indiana sold those products to customers in other States and foreign countries upon orders taken subject to approval at the home office. It was held that the Commerce Clause (Art. 1, Section 8 of the Constitution) was a barrier to the imposition of the tax on the gross receipts from such sales. But as we held in the **Wood Preserving Corp.** case, neither the Commerce Clause nor the Fourteenth Amendment prevent the imposition of the tax on receipts from an intrastate transaction even though the total activities from which the local transaction derives may have incidental interstate attributes. The objections under the Commerce Clause and the Fourteenth Amendment to the tax on the receipts from the three classes of sales involved here are equally without merit."

Thus this Court in the **International Harvester** case once again recognized that a tax on the privilege of engaging in interstate commerce is invalid even though it upheld a gross income tax on intrastate activities.

This ends the discussion of the cases cited by Petitioner.

As for affirmatively supporting the correctness of the Court of Appeals decision, it can be done very briefly.

In the first place, it is admitted by Petitioner (and was admitted even before the Court of Appeals made its finding to this effect) that the sale from it to Respondent is a sale in interstate commerce, despite the so-called local activities carried on by Petitioner's agent, Mobile Gas Service Corporation. (It is not Petitioner's contention that the "local activities" alter the interstate character of the

transaction but merely that they support the tax.) It is therefore unnecessary to cite the numerous cases which substantiate this fact.

In determining whether or not the tax in question places an undue burden on such interstate commerce, the classification of the tax is important, and Respondent went to some length in the Court of Appeals to show that the license imposed by the City of Mobile on gas companies is certainly one on the right or privilege of engaging in the business of selling or distributing natural gas. The Court of Appeals was in agreement, which agreement it expressed as follows: "If these deliveries to Scott and Ideal within the City of Mobile are part of the flow of interstate commerce, the ordinance is inapplicable, for it would be a tax whose payment is a precondition to exercising the privilege of engaging in interstate commerce . . ." Even Petitioner admits this is a privilege tax as it states on page 17 of its brief, "The tax is on the privilege of making the local sale, not the interstate delivery" (a statement which Respondent agrees with only as to the classification of the tax).

It is now well settled that a state or municipal body cannot lay a tax on the act or privilege of engaging in interstate commerce. This is so well settled that the Court of Appeals determined that the crucial question to be decided was whether the gas was moving in interstate commerce when it entered the City of Mobile, and as for the law on the question of the constitutionality of the City of Mobile privilege tax as it applied to Respondent, the Court of Appeals had only the following comment:

> "If these deliveries to Scott and Ideal within the City of Mobile are part of the flow of interstate commerce, the ordinance is inapplicable, for it would be a tax whose payment is a precondition to exercising the privilege of engaging in interstate commerce **'and that avenue of approach' had long been declared unavailable under the commerce clause. Northwestern**

Cement v. Minnesota, 1959, 358 U. S. 450, 464; See **Spector Motor Service v. O'Connor**, 1951, 340 U. S. 602; **Underwood Typewriter Co. v. Chamberlain**, 1920, 254 U. S. 113, 119."

There are numerous other cases as well in which this is made clear. To cite a few: **Ozark Pipe Line Corporation v. Monier**, 69 L. Ed. 439, 266 U. S. 555; **Puget Sound Stevedoring Co. v. State Tax Commission**, 82 L. Ed. 68, 302 U. S. 90; **State Tax Commission of Mississippi v. Interstate Natural Gas Co., Inc.**, 76 L. Ed. 156, 284 U. S. 41; **Gay v. United Gas Pipe Line Company**, 32 S. 2d 600; and **United Gas Pipe Line Co. v. Lee**, 17 S. 2d 553. (The last two cases, being the same case appearing before the Supreme Court of Florida on two occasions, are particularly interesting as they involve United Gas Pipe Line Company, Petitioner here, represented by the same counsel, taking in effect the opposite position from its contentions in the instant case and winning.)

Petitioner has briefly attempted to distinguish the **Spector** case, supra, and **Railway Express Agency v. Virginia**, 347 U. S. 359, 98 L. Ed. 757, on the ground that they involved common carriers engaged in transporting the property of others instead of its own property. This contention is a little confusing in view of Petitioner's admission otherwise that the transaction between Petitioner and Respondent is one in interstate commerce. It is of no consequence, however, as it is clear from the cases that persons transporting their own product, gas, which they sell and deliver, can be, and are, engaged exclusively in interstate commerce. In **Mississippi River Fuel Corporation v. Hoffman**, supra; **Texas Gas Transmission Corp. v. Atkins**, 197 Tenn. 123, 270 S. W. 2d 384, certiorari denied, 348 U. S. 883, 99 L. Ed. 694; **Gay v. United Gas Pipe Line Company**, supra; and **Panhandle Eastern v. Public Service Commission**, supra, it was held that gas companies which transported natural gas which was owned by them, which

was sold to local utilities for resale and to industrial users for consumption, were engaged solely in interstate commerce.

Lastly, Petitioner has suggested that the tax in question is on the privilege of making the local sale, not the interstate delivery. In this statement, Petitioner is certainly confused. The transaction between Petitioner and Respondent is based on a contract between the two under which Respondent purchases gas at its plant site from Petitioner, which gas is delivered by Petitioner from without the State. This is clearly a sale in interstate commerce.

CONCLUSION.

Petitioner is engaged in exclusive interstate commerce in Alabama, the sale from Petitioner to Respondent is a sale in interstate commerce, the tax in question, as it applies to Petitioner, is a tax on the act or privilege of engaging in interstate commerce and such a tax, in such application, is unconstitutional as violative of the Commerce Clause of the United State Constitution.

The petition for certiorari should be denied.

Respectfully submitted,

MARION R. VICKERS,
P. O. Box 990,
Mobile, Alabama,

EDWIN J. CURRAN, JR.,
P. O. Box 990,
Mobile, Alabama,
Counsel for Respondent.

VICKERS, RHS, MURRAY & CURRAN,
P. O. Box 990,
Mobile, Alabama,
Of Counsel.

Certificate of Service

I, Marion R. Vickers, one of the attorneys for Ideal Cement Company, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of March, 1961, I served copies of the foregoing Brief of Respondent in Opposition on United Gas Pipe Line Company, Petitioner herein, by mailing the same in duly addressed envelopes, with first postage prepaid, to its attorneys of record as follows:

E. Dixie Beggs
Yonge, Beggs & Lane
P. O. Box 1351
Pensacola, Florida

George E. Stone, Jr.
First National Bank Building
Mobile, Alabama

Saunders Gregg
P. O. Box 1407
Shreveport, Louisiana

.....

P. O. Box 990
Mobile, Alabama